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18 United States of America

19
20 UNITED STATES DISTRICT COURT
21 FOR THE CENTRAL DISTRICT OF CALIFORNIA
22
23 WESTERN DIVISION

24 DONOVAN J. FOSTER,
25 Plaintiff,
26 v.
27 UNITED STATES OF AMERICA,
28 Defendant.

29 No. 2:22-cv-08522-FWS-PVC

30 DEFENDANT'S *EX PARTE*
31 APPLICATION TO STRIKE
32 PLAINTIFF'S OPPOSITION TO
33 DEFENDANT'S MOTION TO DISMISS
34 OR, IN THE ALTERNATIVE,
35 CONTINUE DEFENDANT'S REPLY
36 DEADLINE AND THE MOTION TO
37 DISMISS HEARING

38 Honorable Fred W. Slaughter
39 United States District Judge

40
41 **EX PARTE APPLICATION**

42 Pursuant to Local Rule 7-19, Defendant United States of America, apply *ex parte*
43 to strike Plaintiff's opposition (Dkt. No. 44) to Defendant's Motion to Dismiss (the
44 "Motion") (Dkt. No. 43) or, in the alternative, to continuance Defendant's reply deadline
45 the Motion's hearing date. Defendant requests that Plaintiff's opposition be stricken as it
46 was filed eight days late in violation of Local Rule 7-9. This is now the second Motion to

1 Dismiss opposition that has been untimely filed by Plaintiff (*see* Dkt. No. 16).
 2 Alternatively, Defendant requests that the Court continue Defendant's reply deadline and
 3 the Motion's hearing date. *See* attached Declaration of Jonathan Russell Blakey ("Blakey
 4 Decl."), ¶ 8. Defendant proposes a continuance as follows:

Event	Current Date	Proposed Date
Defendant's Reply Deadline	August 3, 2023	August 16, 2023
Hearing	August 17, 2023, at 10 a.m.	September 14, 2023, at 10 a.m. ¹

10
 11 This is the first request for a continuance of these deadlines.

12 **Urgency:** This order is sought by means of an *ex parte* application because there is
 13 insufficient time to file a motion to strike or seek a continuance of the deadlines by noticed
 14 motion before the current August 17, 2023 hearing date.

15 **Notice:** On August 7, 2023, the undersigned counsel corresponded with Plaintiff's
 16 counsel, Veronica Aguilar, via email, regarding Plaintiff's late opposition filing and
 17 informed her that in the event she does not present defense counsel with a joint stipulation
 18 to continue the reply deadline and hearing date, Defendant would be forced to file an *ex*
 19 *parte* application seeking additional time for a reply. Blakey Decl., ¶¶ 5 and 6. Plaintiff's
 20 counsel failed to present defense counsel with a proposed stipulation. *Id.*, ¶ 6. On August
 21 9, 2023, defense counsel informed Plaintiff's counsel, via e-mail and voicemail, that
 22 Defendant intended to file this *ex parte* application. *Id.*, ¶¶ 6-8.

23 **Plaintiff's Counsel Contact Information:** Pursuant to Local Rule 7-19, Plaintiff's
 24 counsel's contact information is as follows:

25 Veronica Aguilar

26 The Law Office of Veronica M. Aguilar

27
 28 ¹ Defendant's proposed hearing date is based on the next available motion date listed on
 Judge Slaughter's website.

16870 West Bernardo Drive, Suite 400
San Diego, California 92127
Telephone: (858) 674-6945
E-mail: veronica@vaguilar.com

Respectfully submitted,

Dated: August 11, 2023

E. MARTIN ESTRADA
United States Attorney
DAVID M. HARRIS
Assistant United States Attorney
Chief, Civil Division
JOANNE S. OSINOFF
Assistant United States Attorney
Chief, Complex and Defensive Litigation
Section

/s/ Jonathan Russell Blakey
JONATHAN RUSSELL BLAKEY
Assistant United States Attorney

Attorneys for Defendant
United States of America

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant applies *ex parte* to strike Plaintiff's late filed opposition to Defendant's
 3 Motion to Dismiss (the "Motion") or, in the alternative, continue Defendant's deadline to
 4 file a reply and the Motion's hearing date. The request is based on the following reasons:

5 Defendants filed their Motion to Dismiss Plaintiff's First Amended Complaint
 6 ("FAC") on July 17, 2023. Dkt. 43. Pursuant to the Central District of California's Local
 7 Rules and the Court's Procedures, Defendant noticed the Motion for hearing on August
 8 17, 2023. Blakey Decl. ¶ 2; Dkt. 43. Pursuant to Local Rule 7-9, Plaintiff's opposition was
 9 therefore due on July 27, 2023, and Defendant's reply was due on August 3, 2023. Blakey
 10 Decl. ¶¶ 3 and 4; *see also* Local Rules 7-9, 7-10

11 On August 4, 2023, Plaintiff filed his opposition to Defendant's Motion, eight days
 12 late. Dkt. 44. Pursuant to Local Rule 7-12, "[t]he Court may decline to consider any
 13 memorandum or other document not filed within the deadline set by order or local rule."
 14 L.R. 7-12. Here, Plaintiff not only filed his opposition more one week late, but his
 15 opposition was also filed without leave of Court **after Defendant's reply deadline had
 16 pass as well.** This is not the first time Plaintiff has failed to file a timely an opposition.
 17 *See* Dkt. No. 16 (Defendant's Notice of Non-Receipt regarding Plaintiff's opposition to
 18 Defendant's initial motion). Accordingly, it is appropriate for the Court to strike Plaintiff's
 19 untimely opposition and grant Defendant's Motion if it so chooses. *See Pham v. Talkdesk,
 20 Inc.*, No. 2:22-cv-05325, 2023 WL 2558554 (C.D. Cal. Jan. 11, 2023) ("Plaintiff's failure
 21 to timely respond to Defendant's motion operates as his consent to the granting of the
 22 motion, and the Court may grant Defendant's **motion to dismiss** on this basis."); *see also*
 23 *Whitten v. Screen Actors Guild*, No. 2:19-cv-05818, 2019 U.S. Dist. LEXIS 185223, at *2
 24 (granting the defendants' motion to dismiss for failure to file a timely opposition).

25 In the alternative, Defendant requests that the Court continue Defendant's reply
 26 deadline and the hearing on the Motion. Under Federal Rule of Civil Procedure 6(b)(1)(A),
 27 the Court may extend the dates for good cause. Good cause supports this application
 28 because Plaintiff filed his opposition on August 4, 2023, eight days late and after

1 Defendant's reply deadline had passed, all without leave of Court. This Court's Local
2 Rules provide that:

3 [e]ach opposing party shall . . . file with the Clerk . . . (a) the evidence upon
4 which the opposing party will rely in opposition to the motion and a brief but
5 complete memorandum which shall contain a statement of all the reasons in
6 opposition thereto and the points and authorities upon which the opposing
7 party will rely, or (b) a written statement that that party will not oppose the
8 motion.

9 L.R. 7-9 (emphasis added). The language of the Rule is unequivocal; it is not discretionary.
10 Unlike a reply brief, *see* L.R. 7-10, parties must file an opposition or notify the Court of
11 their non-opposition within the time constraints.

12 Plaintiff's late opposition filing not only violates Local Rule 7-9, but has also
13 precluded Defendant from having sufficient time to prepare and file its reply brief by the
14 August 3, 2023 deadline. Defense counsel attempted to work with Plaintiff's counsel and
15 agreed, upon Plaintiff's counsel's request, to file a joint stipulation continuing the reply
16 deadline and Motion hearing date, but Plaintiff's counsel never presented a proposed
17 stipulation to defense counsel despite promising to do so on August 7, 2023. Blakey Decl.,
18 ¶¶ 5-7.

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For all the above reasons, Defendant respectfully requests that the Court strike the Plaintiff's opposition, or in the alternative, continue Defendant's reply deadline and the hearing on the Motion.

Respectfully submitted,

Dated: August 11, 2023

E. MARTIN ESTRADA
United States Attorney
DAVID M. HARRIS
Assistant United States Attorney
Chief, Civil Division
JOANNE S. OSINOFF
Assistant United States Attorney
Chief, Complex and Defensive Litigation
Section

/s/ Jonathan Russell Blakey
JONATHAN RUSSELL BLAKEY
Assistant United States Attorney

Attorneys for Defendant
United States of America

1 **DECLARATION OF JONATHAN RUSSELL BLAKEY**

2 I, Jonathan Russell Blakey, do hereby declare and state as follows:

3 1. I am an Assistant United States Attorney for the Central District of California.
4 I am assigned to the defense of this action. I make this Declaration based on my personal
5 knowledge of the facts and circumstances set forth herein, as well as my review of the
6 official files of the United States Attorney's Office for the Central District of California.

7 2. On July 17, 2023, I filed a Motion to Dismiss ("Motion") on behalf of
8 Defendant United States of America in response to Plaintiff Donovan J. Foster's First
9 Amended Complaint. Dkt. 29 and 43. Pursuant to and in compliance with the Local Rules,
10 I set the Motion for hearing on August 17, 2023. Dkt. 43.

11 3. Pursuant to Local Rule 7-9, Plaintiff's opposition was due July 27, 2023.

12 4. On Friday, August 4, 2023, Plaintiff filed his opposition, eight days late and
13 after Defendant's reply deadline had passed (August 3, 2023) pursuant to Local Rule 7-
14 10.

15 5. I immediately emailed Plaintiff's counsel, Veronica Aguilar and informed
16 her that because the opposition was filed late, seeking leave of court was necessary and
17 that continuing the reply deadline and the Motion hearing date would also be necessary.
18 Because the opposition was filed after Defendant's reply deadline, and because I had
19 several other matters scheduled for the week of August 7th, I needed additional time to
20 assess Plaintiff's opposition and prepare a reply.

21 6. In response, Ms. Aguilar requested that Defendant agree to a joint stipulation
22 to continue Defendant's reply deadline and the hearing date. I agreed and asked that Ms.
23 Aguilar send me a draft stipulation by the close of business on August 7, 2023. I did not
24 receive a stipulation from Ms. Aguilar.

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1 7. On August 9, 2023, I informed Ms. Aguilar, via e-mail and voicemail, that
2 Defendant would file an *ex parte* motion to strike Plaintiff's opposition or, in the
3 alternative, continue Defendant's reply deadline and the Motion hearing date. Ms. Aguilar
4 has not responded.

6 I declare under penalty of perjury that the foregoing is true and correct.

7 Executed on August 11, 2023, at Los Angeles, California.

/s/ Jonathan Russell Blakey
JONATHAN RUSSELL BLAKEY